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IN THE

Supreme Court of the United States

October Term, 1962

No. 711

NATIONAL BULK CARRIERS, INC., In personam,
And the SS BULKCRUDE, In rem,

Petitioners,

v.

MRS. VALERIE JEAN GARDNER, As Administratrix
of the Estate of Robert Edward Gardner, Jr., Deceased,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY TO OPPOSITION BRIEF OF RESPONDENT GARDNER AND APPENDIX

STATEMENT

The jurisdictional requisites, applicable statutes, opinions below, statement of the case, questions presented and the reasons for granting the Writ of Certiorari have all been dealt with in Petitioners' Petition for a Writ of Certiorari. This reply to Respondent Gardner's Op-

position Brief is believed necessary in order to correct certain obvious errors and misstatements therein.

Petitioners will quote from the record to support their charges of errors and misstatements in Respondent's Opposition Brief.

Page references hereinafter given will refer to pages in the Opposition Brief unless otherwise designated.

MISSTATEMENTS AND ERRONEOUS CONCLUSIONS IN RESPONDENT'S OPPOSITION BRIEF

Page 2:

> "* * *. The Master nevertheless kept steaming on his course and speed while a search of the vessel was made which revealed that Gardner *was overboard*. * * *. (Italics Supplied)

Respondent's above statement that a search of the vessel revealed that Gardner was overboard is untrue. The search merely failed to locate Gardner on the vessel. This is confirmed by the Master's radio message to the Coast Guard at Miami that Gardner was *missing*, the Coast Guard's reply and its emergency "All Ship's Broadcast", all quoted on page 5 of Petitioners' Petition. The Master testified Respondents-Appellees' Appendix (Bulkcrude), p. 115:

> "A. Well, I plotted the—already had the position-approximate position of where he was last seen and I had the position we were at the present time, which was a time elapsed of seven hours and was roughly a hundred miles, or slightly more, and there was no reasonable probability in turning back on a dark night, such as it was, to try and search for a

man that had been—that we didn't know where he went overboard. *We didn't know whether he did go overboard or not.* We weren't sure of anything. We had no position to search, no place to search, * * *." (Italics Supplied)

Notwithstanding the correctness of the above testimony, Respondent throughout the Opposition Brief attempts to give to this Court the erroneous understanding that Gardner, when first missed, was overboard, that the Master then knew or should have known he was overboard and that liability should be imposed because the Master did not make the same rescue efforts as would have been required had he known that Gardner was overboard and also known when and where he went overboard.

Page 4:

"* * *. He (Master) further admitted that his own inaction in failing to turn around to try to find Gardner precluded *any* probabilities of saving Gardner's life. * * *." (Italics Supplied)

The Master made no such admission. His testimony was, that under the conditions existing that night, there would have been no reasonable probability of the BULK-CRUDE rescuing Gardner had the Master turned back and attempted a search.

Here, again, Respondent is advancing an erroneous and misleading conclusion, wholly unsupported by evidence. The Master, after consulting with his Chief Officer, concluded that under the circumstances existing that night, there would be no reasonable probability of the Master rescuing Gardner if he turned back and at-

tempted a search. He thereupon promptly notified the Coast Guard that Gardner was missing (not overboard) and the Coast Guard promptly notified all shipping in the area to keep a sharp lookout. The experts, including the Coast Guard officers, in particular Respondent's Captain Ing, Chief of Search and Rescue for the Coast Guard, were in agreement that the action taken by the Master in notifying the Coast Guard was proper. Such action was approved by the Second Circuit in *Miller v. Farrell Lines*, 247 F. (2d) 503 at p. 505.

Page 4:

> "* * *. Indeed the Coast Guard officer stated that he could not send search planes or ships because the Master had not given his course and position when reporting that Gardner was missing.* * *."

This statement is erroneous and misleading. The Coast Guard officer receiving the BULKCRUDE's message at Miami that Gardner was missing was Warrant Officer Ernest E. Fuller. As to why he did not dispatch a ship or plane that night, he testified (App. p. 41 of Petition):

> "A. There are several reasons. No. 1: It was nighttime.***. No. 2: There was a time element involved. They said they had last (***) seen the man, I believe, about six o'clock in the evening. That was in the vicinity of Tennessee Reef. This was around one, which was a period of almost seven hours later. Not having any specific point to look for a man overboard, it is impractical at night. It is hard enough to find a man in the water in the daytime, let alone at night. Therefore, there were no units dispatched to look for this man. Had we had a specific area to look for, we would have sent a plane *come daylight* the next morning. ********." (Italics Supplied)

On cross examination this witness further testified, (Fuller dep. p. [redacted]:

> "Q. Mr. Fuller, this apparent lapse of time from the time the seaman was missed and as reported to you, does this influence your decision as to whether any air or sea search would be made?
>
> A. Well, it was considered, of course. As I said, the seven hours involved there—and if the vessel travels at a speed of 15 knots, it would be covering quite a distance. When you start trying to localize an area where the man could have been lost, that is quite a job. On the other hand, as I said, one of the biggest factors involved there would be the fact that it was dark."

Obviously the above statement in Respondent's Opposition Brief is improper. If the Coast Guard officer had been of the opinion that he could not send search planes or ships "because the Master had not given his course and position when reporting that Gardner was missing", the Coast Guard officer when asked to give his reasons why he did not dispatch a plane or ship on the night he was advised by the Master that Gardner was missing, would have said so. It is significant that no such reason was given.

Page 4:

> "****. Both of the shipowner's expert Master Mariner witnesses stated that they would have turned the ship around and retraced the course at least an hour or an hour and a half after the search revealed Gardner was not on board. **** ."

The record supports no such statement. Over objection, Petitioners' experts were asked to assume a state of facts

not in this case, i.e., that Gardner was last seen a half hour or an hour before he was missed for his midnight watch. (The testimony is that he was not seen for five hours before he was missed.) Even on such assumed facts, these experts did not testify that after the search of the vessel they would turn the ship around and retrace the course as Respondent alleges. Petitioner's expert, Captain Adams, on cross, testified (Tr. p. 528):

> "Q. Then if he (Gardner) was last seen an hour beforehand, you wouldn't go out and search?
>
> A. If he was last seen an hour beforehand and there was no definite information as to the man having gone overboard, I doubt very much if I would have gone out and searched."

He further testified (Tr. p. 531):

> "Q. Let me get this straight. If he was last seen an hour beforehand, would you have gone back?
>
> A. Last seen an hour beforehand and it took an hour and a half or two hours to search the ship, I doubt it very much."

Petitioners' expert, Captain McIntyre, on cross, testified (Tr. p. 424):

> "Q. Suppose you did not see him go overboard Captain, but it was determined that he was not on the ship, what is your answer?
>
> A. My answer is to ascertain all the facts, notify the Coast Guard who have the proper search and rescue equipment. To turn the vessel about, you're going back aimlessly. You don't know where to look. Where are you going to look?

And at (Tr. p. 426):

"Q. Under the circumstances that you did not see the man go overboard, but that he could have gone overboard a few minutes or a few seconds before you could not find him?

A. Unless I had some concrete evidence as to time and position, I couldn't (wouldn't) turn the ship around to go back.

Q. Why?

A. Because you have no object in view. You don't know where you're going to look or when or where to look for the man."

These experts, as well as the Coast Guard officers, further qualified their testimony by stating that unless they knew that the man was overboard, as distinguished from missing, and they could pinpoint the time and place he went overboard, any chance of rescue would be almost impossible, especially on a dark night as it was in this case.

Page 4:

"*****. *** and World War II statistics on rescue were introduced showing that approximately 70% of men were rescued after their ships had sunk. Indeed the Coast Guard Rescue Plan showed that the probabilities of rescue within three days were excellent for a man in warm or tropical waters such as these."

The above mentioned statistics, also introduced over Petitioners' objection, involved cases where the facts were entirely different from those in the *Gardner* case. In those cases the men known to be overboard were equipped with life rafts, life jackets or some kind of buoyant apparatus with which to stay afloat.

Page 4:

> "The District Court dismissed the libel of Gardner's widow holding that the Master's failure to make even the slightest attempt to save the life of Gardner would not render liability unless it were shown that if the Master had made any attempts to rescue, these attempts *would be successful.*" (Italics Supplied)

The District Court did not so hold. The District Court dismissed the libel, not because it believed it necessary to show that any attempt at rescue by the Master would have to be successful in order to render liability, but because it believed from the evidence that on the facts in this case had the Master turned back and attempted a search there would have been no reasonable possibility of success. We quote from the Opinion (App. pp. 8-9 of Petition):

> "Holding that, under the peculiar facts of this case, the master of the BULKCRUDE was not negligent in failing to reverse his course for the purpose of conducting a search, and that, in any event, *there was no reasonable possibility of success* and, hence, there was no causal relation between the negligence, if any, and the death, a decree will be entered dismissing the libel." (Italics Supplied).

DECISION BELOW VIOLATES McALLISTER v. UNITED STATES

Respondent, contrary to the test laid down in *Harris v. Pennsylvania Railroad Company*, (4 Cir.) 50 F. (2d) 866, to the effect that the duty of the ship is to use every *reasonable* means to save the life of a crewmember, con-

tends without supporting evidence, that the Master did nothing for his crewman in distress (Opposition Brief, p. 6) and that the Master failed in his positive duty to rescue Gardner. The law did not impose a positive duty upon the Master to rescue Gardner, as Respondent alleges. In the Harris case, supra, where the man was known to be overboard—not missing as in this case, the Fourth Circuit held that the duty of the ship was to use every reasonable means to save him. This is a legal duty and was approved by the Court of Appeals in this case (App. p. 20 of Petition). In the *Harris* case the duty of search was not involved because it was known that Harris was overboard and where. Therefore, the duty there involved was that of rescue. In the instant case it was not known whether Gardner was overboard or not so that the first question which confronted the Master when advised that Gardner did not report for his midnight watch, was where is the man. The evidence is abundantly convincing (a factual issue), that had the Master turned back and attempted a search Gardner would not have been located. Therefore, the legal duty to use every reasonable means to *rescue* the man never arose. The Fourth Circuit admits the correctness of this principle of law in its statement that the duty of search *arises* when there is a *reasonable possibility of rescue* (App. p. 23 of Petition). Yet by reversing the District Court on the testimony of one inexperienced witness against the overwhelming testimony of seven experts whose testimony had been accepted by the District Court, the Court of Appeals has substituted its appraisal of the facts for that of the District Court sitting in admiralty. Although the evidence was overpowering in favor of Petitioners that there was no reasonable possibility of rescue, which normally would have

produced an affirmance of the findings of the District Court as trier of the facts, the Fourth Circuit decreed otherwise.

From the above it is clear that there were conflicts in the evidence and that the Court of Appeals has overturned the District Court's findings of fact and substituted its own for those of the District Court, which this Court in *McAllister v. United States,* 348 U. S. 19, 75 S. Ct. 6, 99 L. Ed. 20, holds cannot be done.

Petitioners point out (Petition p. 16) that this Court in *McAllister v. United States,* supra, held that Circuit Courts are without the power to try factual issues de novo or to substitute their appraisal of the facts for that of the District Court sitting in admiralty when the District Court's findings are no cletarly erroneous. No contention was made in the amended majority opinion of the Court of Appeals, in the instant case, that the District Court's findings are clearly erroneous or that they are without evidence to support them.

It is argued (Opposition Brief p. 8) that if it should be thought that there were material conflicts in the evidence which the District Court had to resolve and make a finding on, it is clear that the Court of Appeals regarded the District Court's findings as clearly erroneous, or if such findings were supported by evidence, the Court of Appeals was left with a definite conviction that a mistake had been committed, giving them the right to reverse.

As shown above, this Court in *McAllister v. United States,* supra, laid down the rule (Petition p. 22) that Courts of Appeal are not to try cases of this kind de novo, and are not to substitute their opinion for that of

the District Court merely because they may disagree with the decision below. The test there laid down by which the Court of Appeals may set aside the judgment of the District Court because it is clearly erroneous is that the reviewing court on the *entire evidence* must be left with a definite and firm conviction that a mistake has been committed, and further, that in relation to the District Court's finding, this Court stands in review in the same position as the Court of Appeals.

For the reasons heretofore stated it is clear that the Court of Appeals in reversing the District Court could not and did not reach a firm conviction *on the entire evidence* that a mistake had been committed. To quote the language used by this Court in the *McAllister* case (75 S. Ct. at p. 9):

> "Certainly we cannot say on review that a judgment based upon such evidence is clearly erroneous. ***."

CONFLICT OF DECISIONS

The Petition, beginning at page 23, points out the particulars in which the decision of the Fourth Circuit in the instant case, conflicts with the decision of the Second Circuit in *Miller v. Farrell Lines,* supra, and the decision of the Fifth Circuit in *Barrios v. Waterman Steamship Corp.* 290 F. (2d) 310. Respondent Gardner (Opposition Brief), alleges that these cases were considered by the Court of Appeals and were not relevant to this case since they turned on their own peculiar facts and were primarily tried on grounds other than this case. The distinction advanced is without merit.

Respondent contends that the District Court's Findings of Facts and Conclusions of Law in the *Barrios* case show that liability was claimed in the District Court because of negligence of the ship in causing Barrios to fall overboard and that the failure to rescue doctrine was claimed for the first time in the Fifth Circuit but not seriously relied on. These efforts to show dissimilarity and likewise no conflict, between the *Barrios* case and the *Gardner* case, are baseless. The District Court's Findings of Fact that the Administratrix of Barrios' estate brought the action alleging that the death of Barrios as a result of falling from the vessel was proximately caused by the negligence of the defendant, does not rule out other negligence nor does it attempt to define the numerous acts of negligence charged against the defendant, both in the pleadings and in the evidence. The complaint (App. p. 1) specifically charged the defendant, among other things, with negligence in rescue, including failure of the vessel to turn back. The evidence (App. pp. 4, 5) deals with the reasonable possibility of rescue, the dangers Barrios encountered if he went overboard and the favorable weather existing from 3:35 A.M., when Barrios was found missing from his position as lookout, up to 6:49 that morning when heavy weather was encountered, and the reasons why the Master did not turn back and attempt a search. Indeed, the record shows that the greater part of the testimony in the District Court involved the issues of search and rescue. These issues were also definitely presented on the appeal (App. pp. 6, 7) and are spelled out in the brief for Appellant Barrios, under the caption "Questions Involved On Appeal and Specification of Errors".

Respondent's attempt (Opposition Brief p. 10), to

distinguish *Miller v. Farrell Lines, Inc.*, supra, certiorari denied 355 U. S. 912, from the instant case is likewise ineffective. Nothing here said by Respondent Gardner destroys the reasons given by Petitioners (Petition p. 23), why the decision of the Fourth Circuit in this case does not conflict with the decision of the Second Circuit in the *Miller* case. The suicidal phase of the *Miller* case did not destroy the theory of failure to rescue, as suggested by the Fourth Circuit. It merely added one more speculation to the long list of speculations which the Second Circuit held were not sufficient upon which to impose liability upon the shipowner. The fact that some search was made in *Miller* but discontinued as soon as darkness came on, supports Petitioners' contention that the District Court's conclusion that there would have been no reasonable possibility of rescuing Gardner had the Master turned back and attempted a search, was correct. Furthermore, in the *Miller* case the Second Circuit held that the plaintiff had the burden of showing that the seaman was alive and could have been rescued if due diligence to save him had been used by the defendant. The decision of the Fifth Circuit in the *Barrios* case is to the same effect. The Fourth Circuit in the *Gardner* case places this burden on the shipowner, thereby coming in direct conflict with both the Second Circuit and the Fifth Circuit. Such action by the Fourth Circuit results in the Circuits being in conflict in applying proper principles and standards and calls for review by this Court, pursuant to Supreme Court Rule 19.

The decision of the Fourth Circuit, after approving the *Harris* case that it is for the jury to decide whether the man could have been saved if due diligence had been

used (Petition p. 10), on the testimony of one witness whose testimony was not accepted by the District Court as against seven witnesses whose testimony was so accepted, has reversed the District Court's finding of fact that there would have been no reasonable possibility of rescue had the Master turned back and attempted a search. It is inconsistent for the Fourth Circuit to cite with approval cases holding that it is for the jury to decide whether there was a reasonable possibility of rescue and in the same case disregard the jury's (Court's) finding that there was no reasonable possibility of rescue and reverse the District Court. The law does not require the Master to attempt a vain undertaking, yet the Fourth Circuit has held him negligent because he did not turn back and attempt a search when there was no reasonable possibility of rescue.

In summary, the legal duty on the ship to use reasonable means to rescue the seaman overboard, as established in *Harris v. Pennsylvania R. Co.*, supra, and other cases cited by Respondent, never arose in this case where the evidence satisfied the trier of the facts, that for the reasons shown, there would have been no reasonable possibility of rescue had the Master turned back and attempted a search. The Fourth Circuit admits the correctness of this rule of law but has refused to follow it. In its amended majority opinion (App. p. 23 of Petition), it said:

> "****. It was less than a duty to rescue him, but it was a positive duty to make a sincere attempt at rescue. ****. *The duty arises when there is a reasonable possibility of rescue.* ****." (Italics Supplied)

A reversal by the Court of Appeals of the fact findings of the District Court, overwhelmingly supported by the evidence, including the testimony of Captain Ing, Respondent Gardner's expert from the Coast Guard on search and rescue, whose testimony, aside from reference thereto in the dissenting opinion of Judge Haynsworth, has yet to be mentioned either by the Court of Appeals or by Respondent, conflicts with the decision of this Court in *McAllister v. United States*, supra. For the reasons heretofore advanced and more fully dealt with in Petitioners' Petition, the decision of the Fourth Circuit in this case also conflicts with the decision of the Second Circuit in *Miller v. Farrell Lines*, supra, and with the decision of the Fifth Circuit in *Barrios v. Waterman Steamship Corp.* supra.

CONCLUSION

Petitioners respectfully submit that a writ of certiorari should be granted.

Respectfully submitted,

NATIONAL BULK CARRIERS, INC., ET AL,
PETITIONERS

R. ARTHUR JETT
ROY L. SYKES
R. ARTHUR JETT, JR.
Counsel for Petitioners

JETT, SYKES & COUPLAND
701 Citizens Bank Building
Norfolk 10, Virginia